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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

REBECCA A. ROWE,)	
)	
Plaintiff,)	
)	No. C 00-03676 BZ
v.)	
)	
CITY & COUNTY OF SAN FRANCISCO,)	ORDER DENYING DEFENDANT'S
et al.,)	MOTION FOR SUMMARY JUDGMENT
)	
Defendants.)	

Before the court is defendant City and County of San Francisco's ("City's") motion for summary judgment on plaintiff Rebecca Rowe's claims under both the American with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.* ("ADA") and California's Fair Employment and Housing Act, Cal. Gov't Code §§ 12900 *et seq.* ("FEHA").¹ Plaintiff alleges that defendant discriminated against her on the basis of her disability by denying her a reasonable accommodation

¹ The parties have consented to the jurisdiction of a United States Magistrate Judge for all proceedings including entry of final judgment pursuant to 28 U.S.C. § 636(c).

1 through reassignment to a different position. For the
2 reasons set forth below, defendant's motion is denied.²

3 Plaintiff began working for the City's Municipal
4 Transportation Agency ("MUNI") as a 9163 Transit Operator
5 in June of 1979. On September 22, 1997, plaintiff was
6 taken off work due to complications resulting from an
7 industrial injury she suffered on April 15, 1997.
8 Specifically, plaintiff suffered from lower back pain and
9 disc herniations. Plaintiff also developed problems in
10 her right hand due to carpal tunnel syndrome and
11 arthritis. Rowe's treating physician, Dr. Dominic Tse,
12 recommended at this time that she not return to work as a
13 Transit Operator due to her lower back and wrist
14 conditions. In late April of 1998, Rowe returned to work
15 and was temporarily assigned to office work. Shortly
16 thereafter, on May 8, 1998, Rowe formally requested a job

18 ² Because ADA law interpreting the parties' obligations
19 under the reasonable accommodation process has been applied to
20 claims under the FEHA, the same analysis of the interactive
21 process and the availability of a vacant position will apply
22 to defendant's summary judgment motion for both claims.
23 See Jensen v. Wells Fargo Bank, 85 Cal. App. 4th 245, 262-63
24 (2000). In preparing for trial, the parties should be mindful
25 that the California Supreme Court is reviewing the retroactive
26 application of Cal. Gov't Code § 12926(k) (1) (B) (ii) (West Supp.
27 2001), which amended the definition of an individual with a
28 disability under FEHA to one that "limits," rather than
"substantially limits," a major life activity. See Colmenares
v. Braemar Country Club, Inc., 107 Cal. Rptr. 2d 719, review
granted and opinion superseded, 111 Cal. Rptr. 2d 336 (Cal.
Aug. 22, 2001); Wittkopf v. Los Angeles, 109 Cal. Rptr. 2d
543, review granted and opinion superseded, 113 Cal. Rptr. 2d
23 (Cal. Oct. 10, 2001). For example, if the Court holds that
the statute applies retroactively, then there may exist
questions as to the appropriateness of defendant's inquiries
to Dr. Tse whether plaintiff's medical condition
"substantially limits" plaintiff's major life activities.

1 transfer as a reasonable accommodation due to her medical
2 condition.

3 On August 28, 1998, Rowe's temporary office
4 assignment ended. Thereafter, she was not working while
5 awaiting a job transfer pursuant to her request. In need
6 of a source of income for her family, and having received
7 no accommodation, Rowe retired on December 1, 1998 so she
8 could receive her pension. On April 9, 1999, defendant
9 closed plaintiff's file after it determined that she was
10 not a qualified individual with a disability entitled to
11 reasonable accommodation under the ADA.

12 After filing complaints with both the Equal
13 Employment Opportunity Commission ("EEOC") and the
14 Department of Fair Employment and Housing ("DFEH"),
15 plaintiff filed this lawsuit. Defendant now moves for
16 summary judgment on the ground that it cannot be liable
17 for a failure to accommodate because plaintiff was
18 responsible for a breakdown in the interactive process.
19 Alternatively, defendant argues that no reasonable
20 accommodation through reassignment was possible prior to
21 plaintiff's retirement.³

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23
24 ³ Defendant has not moved for summary judgment on the
25 grounds that plaintiff is not a "qualified individual with a
26 disability" under the ADA or FEHA. In preparing for trial,
27 however, the parties should be mindful of the Supreme Court's
28 recent ADA decision in Toyota Motor Mfg. v. Williams, 122 S.
Ct. 681 (2002). The Court held that "[w]hen addressing the
major life activity of performing manual tasks, the central
inquiry must be whether the claimant is unable to perform the
variety of tasks central to most people's daily lives, not
whether the claimant is unable to perform the tasks associated
with her specific job." Id. at 693.

1 The Federal Rules of Civil Procedure provide for
2 summary adjudication when "the pleadings, depositions,
3 answers to interrogatories, and admissions on file,
4 together with the affidavits, if any, show that there is
5 no genuine issue as to any material fact and that the
6 moving party is entitled to a judgment as a matter of
7 law." Fed. R. Civ. P. 56(c). A genuine issue of material
8 fact exists if a reasonable jury could return a verdict in
9 favor of the nonmoving party. See Anderson v. Liberty
10 Lobby, Inc., 477 U.S. 242, 248 (1986). The court does not
11 make credibility determinations or weigh conflicting
12 evidence, and views the evidence in the light most
13 favorable to the nonmoving party. See T.W. Elec. Serv. v.
14 Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630-631
15 (9th Cir. 1987) (citing Matsushita Elec. Indus. Co., Ltd.
16 v. Zenith Radio Corp., 475 U.S. 574, 586 (1986)).

17 Title I of the ADA prohibits discrimination "against
18 a qualified individual with a disability because of the
19 disability of such individual in regard to job application
20 procedures, the hiring, advancement, or discharge of
21 employees, employee compensation, job training, and other
22 terms, conditions, and privileges of employment." 42
23 U.S.C. § 12112(a) (West 1995). The ADA specifies a number
24 of actions that constitute discrimination, including "not
25 making reasonable accommodations to the known physical or
26 mental limitations of an otherwise qualified individual
27 with a disability who is an applicant or employee, unless
28 such covered entity can demonstrate that the accommodation

1 would impose an undue hardship on the operation of the
2 business of such covered entity." Id. § 12112(b)(5)(A).

3 The implementing regulations of the ADA state that in
4 determining the appropriate reasonable accommodation, "it
5 may be necessary for the covered entity to initiate an
6 informal, interactive process with the qualified
7 individual with a disability in need of the accommodation.
8 This process should identify the precise limitations
9 resulting from the disability and potential reasonable
10 accommodations that could overcome those limitations." 29
11 C.F.R. § 1630.2(o)(3)(2001). The Ninth Circuit recently
12 joined the majority of other circuits when it held that
13 "the interactive process is a mandatory rather than a
14 permissive obligation on the part of employers under the
15 ADA and that this obligation is triggered by an employee
16 or an employee's representative giving notice of the
17 employee's disability and the desire for accommodation."
18 Barnett v. U.S. Air, Inc., 228 F.3d 1105, 1114 (9th Cir.
19 2000), cert. granted on other grounds, 121 S. Ct. 1600
20 (2001). See also Taylor v. Phoenixville School Dist., 184
21 F.3d 296, 315 (3d Cir. 1999); Fjellestad v. Pizza Hut of
22 Am., Inc., 188 F.3d 944, 952 (8th Cir. 1999); Smith v.
23 Midland Brake, Inc., 180 F.3d 1154, 1172 (10th Cir. 1999);
24 Beck v. Univ. of Wisconsin, 75 F.3d 1130, 1135 (7th Cir.
25 1996); Taylor v. Principal Fin. Group Inc., 93 F.3d 155,
26 165 (5th Cir.), cert. denied, 519 U.S. 1029 (1996).

27 In Barnett, the Ninth Circuit thoroughly examined the
28 nature and scope of the interactive process between an

1 employer and an employee seeking reasonable
2 accommodations. It found that the process requires good
3 faith communication by both parties as a means of
4 achieving the shared goal of identifying an accommodation
5 that would enable an employee to perform her job
6 effectively. See Barnett, 228 F.3d at 1114. An
7 employee's request for a reasonable accommodation may use
8 "plain English" and "need not mention the ADA or use the
9 phrase 'reasonable accommodation.'" Barnett, 228 F.3d at
10 1112 (quoting EEOC Enforcement Guidance: Reasonable
11 Accommodation and Undue Hardship Under the Americans with
12 Disabilities Act, EEOC Compliance Manual (CCH), § 902, No.
13 915.002 (March 1, 1999), at 5438). According to the
14 court, "[b]oth sides must communicate directly, exchange
15 essential information and neither side can delay or
16 obstruct the process." Id. at 1114-15. See also Beck, 75
17 F.3d at 1135 ("A party that obstructs or delays the
18 interactive process is not acting in good faith. A party
19 that fails to communicate, by way of initiation or
20 response, may also be acting in bad faith."). In defining
21 the judiciary's role in evaluating the parties'
22 participation in the interactive process, the Ninth
23 Circuit stated that "'courts should attempt to isolate the
24 cause of the breakdown [in the interactive process] and
25 then assign responsibility' so that '[l]iability for
26 failure to provide reasonable accommodations ensues only
27 where the employer bears responsibility for the
28 breakdown.'" Id. at 1115 (quoting Beck, 75 F.3d at 1135-

1 37). The Ninth Circuit concluded that U.S. Air failed to
2 engage in the interactive process, holding that:

3 [E]mployers, who fail to engage in the
4 interactive process in good faith, face
5 liability for the remedies imposed by the
6 statute if a reasonable accommodation would have
7 been possible. We further hold that an employer
cannot prevail at the summary judgment stage if
there is a genuine dispute as to whether the
employer engaged in good faith in the
interactive process.

8 Barnett, 228 F.3d at 1116.

9 Viewing the evidence in the light most favorable to
10 the plaintiff, there exists a genuine dispute as to which
11 party was responsible for the breakdown in the interactive
12 process. It is undisputed that plaintiff formally put
13 defendant on notice of her medical condition and desire
14 for a job transfer as a reasonable accommodation in early
15 May of 1998. Dr. Tse then sent a letter on June 8, 1998,
16 describing plaintiff's condition as permanent and
17 stationary and precluding her from returning to work as a
18 Transit Operator. His letter stated in part:

19 The condition has been permanent and stationary.
20 The main residual relates to her lower back,
21 which would preclude her from returning to her
22 usual job as a Muni operator, and she should be
23 considered as a Qualified Injured Worker. On a
prophylactic basis, her hand condition also
precludes her from returning to her usual job as
a Muni operator.

24 (Decl. of Sallie Gibson in Supp. of Def.'s Mot. for Summ.
25 J., Ex. C ("Tse Dep."), Ex. I.) By this point, if not in
26 early May, the interactive process had been triggered, and
27 defendant had a good faith duty to process plaintiff's
28 request for a reasonable accommodation. See Taylor, 184

1 F.3d at 313-14 (interactive process triggered when
2 defendant had notice, due to undisputed background
3 information, that plaintiff "might have a disability");
4 Fjellestad, 188 F.3d at 952 (same).⁴

5 Plaintiff introduced evidence that the City could not
6 locate her first request for accommodation and appears to
7 have lost it. The City does not deny that it cannot
8 locate the request for accommodation. However, the City
9 claims it had begun the interactive process, and on June
10 22, 1998 had sent Dr. Tse a health provider certification
11 form to complete. Neither the City nor Dr. Tse possess a
12 copy of this request. More significantly, the City does
13 not appear to have told Rowe what it was doing, despite
14 her repeated attempts to contact Deborah Quinn-Carpenter,
15 the Assistant Director of MUNI's EEO division in charge of
16 evaluating applications for reasonable accommodation,
17 through a series of voice mail messages. While there is a
18 dispute whether there was any communication between the
19 parties during the summer of 1998, both sides agree that
20 the first discussion on this issue occurred on August 28,
21

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23 ⁴ As the Third Circuit stated:

24 What matters under the ADA are not formalisms about
25 the manner of the request, but whether the employee
26 or a representative for the employee provides the
27 employer with enough information that, under the
28 circumstances, the employer can be fairly said to
know of both the disability and desire for an
accommodation.

28 Taylor, 184 F.3d at 313.

1 1998 when plaintiff accidentally encountered Quinn-
2 Carpenter in an elevator.⁵

3 During this chance encounter, Quinn-Carpenter
4 informed plaintiff that she had not yet received the
5 certification form from Dr. Tse, and provided plaintiff
6 with another certification form which plaintiff promptly
7 delivered to Dr. Tse on August 31, 1998. Apparently in
8 response to a letter from plaintiff on September 11, 1998,
9 plaintiff and Quinn-Carpenter next met on September 18,
10 1998 to discuss plaintiff's request for accommodation.
11 (Decl. of Sallie Gibson in Supp. of Def.'s Mot. for Summ.
12 J., Ex. A ("Rowe Dep."), Ex. O at 1-2.) At this time,
13 Quinn-Carpenter assisted plaintiff in filling out a second
14 request for accommodation. At no time did defendant
15 review plaintiff's medical records or have plaintiff
16 examined by another doctor.

17 Meanwhile, Dr. Tse filled out the certification form
18 on September 4, 1998. The first section asks:

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23 ⁵ The parties dispute the activity that occurred between
24 June 8, 1998 and August 28, 1998. According to defendant,
25 Quinn-Carpenter actively pursued Rowe's application once she
26 learned that Rowe's condition was permanent and stationary.
27 For example, Quinn-Carpenter claims that she sent out a
28 health provider certification form to Dr. Tse on June 22,
1998, and followed up on the status of this form by leaving
messages with both Rowe on July 14, 1998, and Dr. Tse on July
15, 1998. Further, Quinn-Carpenter has no recollection of
any voice mail messages left from plaintiff. According to
plaintiff, neither she nor Dr. Tse ever received a message
from Quinn-Carpenter, and Dr. Tse has no record of the
certification form allegedly sent to him in late June.

1 Does this person have a disability which "substantially limits"
2 one or more of his/her major life activities? The major life
activity/activities affected is/are:

3 Walking Talking Breathing Performing Manual Tasks Seeing
4 Working Hearing Learning Caring for Oneself Other:_____

5 (Tse Dep., Ex. K.) Dr. Tse testified that he was confused
6 about how to fill out the form. (Tse Dep. at 66:9-14.)

7 For example, Dr. Tse believes that while plaintiff could
8 walk, she could not walk far. (Id. at 83:10-84:17.)

9 While his testimony is not always clear, (id. at 42:4-22),
10 it appears he was uncertain as to whether, from a legal
11 perspective, this meant she was substantially limited. In
12 any event, he avoided checking any of the boxes⁶ and opted
13 instead to explain plaintiff's medical condition as
14 follows:

15 [P]ersistent low back pain precludes heavy
16 lifting, repeated bending, had bilateral carpal
17 tunnel syndrome, with surgery, having good
result, but still should avoid extensive or
heavy repetitive hand activities.

18 (Id.) In response to how the accommodation was related to
19 plaintiff's medical condition, Dr. Tse wrote that "low
20 back pain precludes her from prolonged sitting." (Id.)

21 Lastly, Dr. Tse indicated that the accommodation would
22 remove barriers to plaintiff's performance by providing
23 "more freedom in her body position and movement." (Id.)

24 The record is not clear what Dr. Tse did with the
25 completed form. Quinn-Carpenter wrote to Dr. Tse on

27 ⁶ Although Dr. Tse did check off the box marked "Other",
28 he later notified Quinn-Carpenter that this was a mistake and
his answer was contained in the medical information he
provided. (Tse Dep., Ex. T.)

1 September 30, 1998, requesting that he fill out the
2 certification form. It is undisputed that the
3 certification form was sent to defendant on October 9,
4 1998. After receiving the form, Quinn-Carpenter wrote to
5 plaintiff on October 26, 1998, informing her that Dr.
6 Tse's certification was incomplete, without explaining
7 why. This was the last time Rowe heard from the City
8 until February of 1999. She also wrote to Dr. Tse on
9 October 27, 1998, requesting more information regarding
10 his apparent checkoff of the "Other" box for major life
11 activities affected. Dr. Tse sent an eight page report to
12 plaintiff's workers' compensation attorney on November 6,
13 1998, providing greater detail regarding plaintiff's
14 medical condition. The report again referred to Rowe's
15 condition as "permanent and stationary," and stated that
16 "[t]here is disability precluding heavy work" and "[s]he
17 is a qualified injured worker, unable to engage in her
18 usual and customary occupation as a Muni operator." (Tse
19 Dep., Ex. Q at 7.) Doctor Tse sent this report to
20 defendant on December 18, 1998. On February 26, 1999,
21 Quinn-Carpenter sent another letter to Dr. Tse requesting
22 clarification on his September 4, 1998 certification. Dr.
23 Tse immediately responded on March 1, 1999, by referring
24 Quinn-Carpenter back to the description of plaintiff's
25 limitations on the original certification form. (Tse
26 Dep., Ex. T.)

27 Viewing these facts in this light, a reasonable jury
28 could conclude that plaintiff was not responsible for the

1 breakdown in the interactive process and that defendant
2 should have more effectively communicated with plaintiff
3 and Dr. Tse.⁷ Focusing on the first months following May
4 8, 1998, defendant does not appear to have ever personally
5 advised the plaintiff that it needed further medical
6 information to process her request. Plaintiff first
7 learned that this was an issue by virtue of a chance
8 encounter with Quinn-Carpenter in late August. Within
9 days, she had presented a new certification form to Dr.
10 Tse and he had completed it. It is unlikely that a jury
11 would conclude that if Rowe had been advised in June of
12 the City's need she would not have acted as promptly.

13 Nor is this case like Tatum v. Hospital of the Univ.
14 of Pa., 57 F. Supp. 2d 145 (E.D. Pa. 1999), on which
15 defendant relies for the proposition that an employee who
16 does not supply the employer with needed medical
17 information is responsible for the breakdown of the
18 interactive process. See id. at 149. Unlike Tatum, in
19 which the only support for the asserted disability was a
20 note on a doctor's prescription pad stating that the
21 plaintiff, a nurse, was "unable to lift or pull heavy
22 patients," id. at 147, in this case the City was or should
23 have been aware of the approximately one year's worth of
24 medical complications the plaintiff had experienced

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26 ⁷ Part of the communications problem may have been that
27 the early communications between defendant and Dr. Tse about
28 plaintiff's ADA claim were made by defendant in the context of
plaintiff's workers' compensation claims and through
defendant's claims adjuster or plaintiff's workers'
compensation lawyer.

1 following her industrial injury and that she had been on
2 temporary disability for some substantial time.⁸ In
3 addition, defendant had various letters and forms Dr. Tse
4 had provided. While they did not clearly state a legal
5 conclusion as to whether the plaintiff was "substantially
6 limited" in her major life activities, they did provide
7 the City with a substantial amount of medical information
8 about her condition. Yet the City never appears to have
9 made its own determination of whether her disability
10 required an accommodation. A jury could well conclude
11 that regardless of how clear the medical information was
12 that the plaintiff was disabled, the City was not going to
13 do anything until Dr. Tse checked a box, and that this was
14 an obstructionist tactic on behalf of the City.

15 The City disputes a number of these facts. Among
16 other things, the City denies that it lost the original
17 request for accommodation, claims that it requested
18 further information from Dr. Tse in late June and in July,
19 claims that it tried to call plaintiff during July but was
20 unable to reach her and denies that plaintiff tried to

22 ⁸ Defendant argues that it legally could not review its
23 workers' compensation medical file to determine if plaintiff
24 was disabled. Although "an employer cannot ask an employee
25 for documentation unrelated to establishing the existence of a
26 disability and the necessity of accommodation," Barnett, 228
27 F.3d at 1115 n.6, it surely has the ability to review an
28 employee's record for more information concerning the
employee's medical condition in determining whether she
possesses a disability and requires an accommodation. See
Cal. Lab. Code § 3762(c) (Deering Supp. 2002) (third party
administrator of employee's workers' compensation claim can
disclose "medical information . . . that is necessary for the
employer to have in order for the employer to modify the
employee's work duties.").

1 contact the City during August. Assuming these disputed
2 facts are material, their existence further supports
3 denial of defendant's motion.

4 Defendant alternatively argues that even if the
5 interactive process did not break down due to plaintiff's
6 bad faith, the reasonable accommodation of a job transfer
7 was not available between September 4, 1998, when Dr. Tse
8 signed the certification, and December 1, 1998, when Rowe
9 retired. "[T]he task of proving . . . that **no** reasonable
10 accommodation was available rests with an offending
11 employer throughout the litigation, and . . . given the
12 difficulty of proving such a negative, it is not likely
13 that an employer will be able to establish on summary
14 judgment the absence of a disputed fact as to this
15 question." Morton v. United Parcel Serv., 272 F.3d 1249,
16 1256 n.7 (9th Cir. 2001) (emphasis in original). See also
17 Taylor, 184 F.3d at 318 ("When an employee has evidence
18 that the employer did not act in good faith in the
19 interactive process, however, we will not readily decide
20 on summary judgment that accommodation was not possible
21 and the employer's bad faith could have no effect.").
22 When making the determination of whether a reasonable
23 accommodation was possible, "the jury is entitled to bear
24 in mind that had the employer participated in good faith,
25 there may have been other, unmentioned possible
26 accommodations." Barnett, 228 F.3d at 1115-16 (quoting
27 Taylor, 184 F.3d at 317-18). Here, it is undisputed that
28 Rowe qualified for a transfer into an Information Clerk or

1 Traffic Checker position, and that fifteen such positions
2 were filled between June 8, 1998 and September 3, 1998.
3 (Joint Statement of Undisputed Facts ¶ 47.) A reasonable
4 trier of fact could conclude that had defendant
5 participated in good faith beginning in May 8, 1998, a
6 reasonable accommodation would have been available to
7 Rowe.

8 Accordingly, **IT IS HEREBY ORDERED** that defendant's
9 motion for summary judgment is **DENIED**.

10 Dated: February 13, 2002

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 Bernard Zimmerman
United States Magistrate Judge

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